(6)

No. 98-1037

In The

Supreme Court of the United States

October Term, 1998

GEORGE SMITH, WARDEN,

Petitioner,

vs.

LEE ROBBINS,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE AMICI CURIAE STATES OF ARIZONA, ET AL. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

In *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), *amending* 125 F.3d 831 (9th Cir. 1997), the Ninth Circuit declared unconstitutional California's procedures governing the filing of no-merit appellate briefs by appointed counsel on behalf of indigent criminal defendants on the stated ground that they do not conform with *Anders v. California*, 386 U.S. 738 (1967). *Robbins* will severely affect the Amici states that have literally thousands of criminal defendants whose appeals mirrored the California procedure. If *Robbins* is allowed to stand, a flood of no-merit appeals will return to the state and federal courts despite the fact that appointed counsel and the state appellate courts have already determined that no arguable appellate issues exist. Other states have joined as Amici herein because *Robbins* severely undermines each state's right to determine its own procedures in compliance with *Anders*. The result dictated by *Robbins* offends the interests of the Amici Curiae in protecting the finality of criminal convictions, assuring equal treatment of all criminal defendants, indigent or affluent, and in preserving public resources.

SUMMARY OF ARGUMENT

Anders and its progeny protect an indigent criminal defendant's right, under the Fourteenth Amendment's due process and equal protection clauses, to the effective assistance of state-appointed appellate counsel in the first appeal as of right. Those cases do not afford indigent criminal defendants more rights under the Constitution than those defendants represented by retained counsel,

they only guarantee that indigent defendants are treated with substantial equality.

In *Robbins*, the Ninth Circuit held that *Anders* requires appointed counsel to state arguable issues and federal courts to search for them on habeas review. The practical result of this holding is that federal courts will now be compelled, in *Anders* cases, to search the state court record for arguable issues, despite the fact that: (1) neither indigent criminal defendants whose appointed counsel file merit briefs nor criminal defendants whose retained counsel withdraw from representing them on appeal because they find no arguable issues are afforded this benefit; (2) indigent criminal defendants whose counsel file no-merit briefs are already afforded a more thorough review of their appeals than other criminal defendants, indigent or not, who file merit briefs; and (3) the indigent criminal defendants' appointed counsel, who file no-merit briefs, as well as the appellate court and its staff have already meticulously searched the state court record for arguable issues and found none to exist.

The Ninth Circuit's opinion in *Robbins* bestows upon indigent criminal defendants whose attorneys file no-merit briefs, the right to a comprehensive federal court habeas review of the state court record. This holding misconstrues *Anders*, and violates the state's right to finality of criminal convictions, undermines its ability to preserve public resources, and violates the principles of equal protection. It also creates a new rule of criminal procedure in a collateral proceeding in violation of *Teague v. Lane*, 489 U.S. 288 (1989).

ARGUMENT

AS A CONSEQUENCE OF *ROBBINS*, FEDERAL COURTS, ON HABEAS REVIEW, WILL SEARCH STATE COURT RECORDS FOR ARGUABLE ISSUES IN *ANDERS* CASES, THEREBY DILUTING THE EQUAL PROTECTION AND DUE PROCESS GOALS ARTICULATED IN *ANDERS*, AND OFFENDING THE STATES' INTERESTS IN ASSURING THE FINALITY OF CRIMINAL CONVICTIONS AND IN PRESERVING PUBLIC RESOURCES.

A. *Anders* and its Progeny: Equal Protection and Due Process Concerns.

In *Anders v. California*, 386 U.S. 738 (1967), this Court evaluated appointed counsel's duty to "prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." *Id.* at 739. There, appointed counsel followed California's established procedures; he wrote a letter advising the appellate court that he had concluded his client's appeal had no merit, and simultaneously advised the court that the defendant wished to file a brief on his own behalf. *Id.* After reviewing the defendant's brief and the record, the California appellate court affirmed the conviction. *Id.* The defendant then filed a habeas corpus petition in the California Supreme Court, and that court also affirmed his conviction. *Id.* at 740-41.

This Court reversed, finding that California's no-merit letter procedure did not comport with "fair procedure and lack[ed] the equality that is required by the Fourteenth Amendment." *Id.* at 741. This Court reasoned that it had "consistently held invalid those procedures 'where the rich man, who appeals as of right, enjoys the

benefit of counsel's examination into the record, research of the law, and marshaling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself.' " *Id.* (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)). In *Douglas*, this Court held that absolute equality is not required in order to comport with the Fourteenth Amendment, so long as the differences between the rich and poor do not "amount to a denial of due process or an invidious discrimination." *Id.* at 356-57 (citations omitted). It held, in *Anders*, that the Constitution required "substantial equality and fair process," which can only be attained if counsel "acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae." *Id.* at 744.

Against this backdrop of equal protection and due process concerns, the *Anders* court articulated a procedure for counsel to follow in cases where an indigent criminal defendant's appointed counsel determines that an appeal would be without merit. It stated that where counsel, after a conscientious examination of the record, finds his indigent client's criminal appeal to be wholly frivolous, counsel should advise the court of that fact and request to withdraw. *Id.* The request to withdraw must be accompanied by "a brief referring to anything in the record that might arguably support the appeal," and that brief must be supplied to the defendant, who then must be permitted to raise any points he chooses. *Id.* The appellate court must then conduct a "full examination of the proceedings" in order to determine whether counsel's determination that the case is wholly without merit is correct. *Id.* If the appellate court concludes that counsel's

no-merit representation is correct, it may grant counsel's request to withdraw and dismiss the appeal, unless state law requires it to proceed to a decision on the merits. If, on the other hand, it finds "any of the legal points arguable on their merits," the court must afford the indigent defendant counsel to argue the appeal before rendering its decision. *Id.*[1]

This Court reaffirmed *Anders'* equal protection rationale in *McCoy v. Wisconsin*, 486 U.S. 429 (1988). There, appointed counsel challenged a state supreme court rule requiring counsel seeking to withdraw to submit a brief to the court that included an explanation regarding why issues that " 'might arguably support the appeal' " lacked merit. *Id.* at 430 (citation omitted). This Court stated that "[t]he principle of substantial equality" requires appointed counsel to make the same "diligent and thorough evaluation of the case" as retained counsel before concluding that an appeal would be frivolous; "[e]very advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court." *Id.* at 438. This Court held that Wisconsin's rule requiring appointed counsel to explain why his client's appeal lacks merit

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[1] The *Anders* court was not unanimous. In dissent, Justice Stewart, joined by Justice Black and Justice Harlan, found the no-merit letter procedure free of constitutional error. *Id.* at 747. Justice Stewart characterized the requirement imposed by the majority as "quixotic" and observed that it was based on the "cynical assumption that an appointed lawyer's professional representation to an appellate court in a 'no-merit' letter is not to be trusted." *Id.* at 746-47.

"furthers the same interests that are served by the minimum requirements of Anders," because it "provides an additional safeguard against mistaken conclusions by counsel that the strongest arguments he or she can find are frivolous." *Id.* at 442.

This Court acknowledged, in *McCoy*, that no-merit briefs are "seldom, if ever" filed by retained counsel. *Id.* at 438. Obviously, this is because "the wealthy client can always seek a second opinion and might well find a lawyer who in good conscience believes it to have arguable merit." *Id.* at 451 (Brennan, J., dissenting). Moreover, if retained counsel finds an appeal to be frivolous, he or she can simply inform the client of that fact and withdraw from the case. Unlike appointed counsel, retained counsel need not seek permission from the court to withdraw. Additionally, in the case of defendants who cannot afford to hire counsel, the court is the appointing authority, fulfilling the constitutional requirement of providing counsel on appeal. Where appointed counsel submits a brief raising no issues, it is incumbent on the appellate court to review the record; the same is not true for defendants with retained counsel. Thus, retained counsel need not comply with the dictates of *Anders* when withdrawing from representing a defendant in a frivolous appeal. *See People v. Placencia*, 11 Cal. Rptr. 2d 727 (1992) (retained counsel not required to follow *Anders* procedures); *Johnson v. State*, 885 S.W.2d 641, 645 (Tex. App. 1994) (the procedural safeguards of *Anders* do not apply to retained counsel). This conclusion is clearly accurate given the intent of *Anders* and its progeny to protect the indigent defendant.

B. *Robbins v. Smith*.

In *Robbins v. Smith*, the Ninth Circuit held that, to comply with *Anders*, appointed counsel must state arguable issues in a no-merit brief. 152 F.3d at 1067. The defendant's appointed counsel thoroughly reviewed the record and concluded that defendant's appeal was without merit, the defendant filed a brief on his own behalf, and the state court had reviewed this together with counsel's no-merit brief and the entire record and found that no arguable issues existed for appeal. The defendant filed a federal habeas corpus action alleging, among other claims, that his appointed counsel had not complied with the dictates of *Anders*.

Despite the fact that the viability of the defendant's appeal had been repeatedly and meticulously reviewed at the state level, the federal district court conducted its own thorough review of the state record and found two issues that it believed to be "arguable."[2] That court held that the case should be returned to state court for a new appeal.

The Ninth Circuit upheld the district court's determination that the defendant's appointed counsel had not complied with *Anders* and that two arguable issues existed for appeal. The court also held that the district court erred in failing to consider the defendant's exhausted claims of constitutional error contained in his petition. *Id.*

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[2] An "arguable" issue is defined, for purposes of California law, as one that has some potential for success, some possibility of a result requiring reversal or modification of the judgment. *See Robbins*, 152 F.3d at 1067 (citing *People v. Johnson*, 123 Cal. App. 3d 106, 109 (1981)).

at 1068-69. The court ruled that the defendant was entitled to a new appeal, based on the violation of *Anders* and the fact that two arguable issues existed, but that the case should be remanded to state court for that appeal only if none of his exhausted claims of constitutional error had merit. *Id.*

C. The Practical Effect of *Robbins*: A Far Cry From Simply Assuring Substantial Equality Among Criminal Defendants in Prosecuting Their Appeals.

Robbins in effect requires federal courts to review the entire state court record in search of arguable issues in *Anders* cases where none have been stated on appeal by appointed counsel or found to exist by the state appellate courts. This results in substantial *inequality* rather than *equality* among criminal defendants, and runs afoul of the very intent of *Anders* and its progeny.

Unlike indigent defendants whose counsel file no-merit briefs, indigent defendants whose appointed counsel file merit briefs are not entitled to a thorough review of their entire case in state court in search of arguable issues. In addition, federal courts do not comb the record for issues in cases where appointed counsel file merit briefs, because this Court has held that appointed counsel's decision regarding which issues to raise is normally conclusive. *See Jones v. Barnes*, 463 U.S. 745 (1983). If, after reviewing the state court record, appointed counsel decides there is a single arguable issue on appeal, regardless of its potential for success, the state court is not required to scour the case for additional arguable issues, nor is the defendant entitled to federal court review of

the record under *Robbins*. As a consequence of *Robbins*, indigent defendants would always be better served if their appointed counsel filed no-merit briefs rather than merit briefs, because a no-merit brief would entitle them to thorough review of the case not only in state court, but in federal court as well. Therefore, counsel would be doing his client a disservice by filing anything other than an *Anders* brief. Creating or compounding inequities between indigent defendants in this manner is clearly contrary to the intent of this Court as expressed in *Anders*.

Indigent defendants whose appointed counsel file *Anders* briefs are already entitled to a tier of state court review unavailable to indigent defendants whose counsel file merit briefs, and, obviously, to defendants whose retained counsel file briefs on the merits or no briefs at all. Entitling those indigent defendants whose counsel file *Anders* briefs to still *another* level of review of their cases in search of arguable issues does not ensure that they are treated equally, but instead bestows upon them more rights than other criminal defendants possess, which is clearly not the intent of *Anders*.

Moreover, if all indigent defendants filed *Anders* briefs to obtain better review of their cases at the state and federal level, state courts would be forced to review the entire record in search of arguable issues in the vast majority of criminal appeals. The Amici Curiae States simply cannot afford to devote their scarce judicial resources to such an exhaustive endeavor.

This Court has emphasized the importance of the state's right to assure the finality of its convictions,

stating, that " '[t]he states possess primary authority for defining and enforcing the criminal law. . . . Federal intrusions into state criminal trials frustrate both the states' sovereign power to punish offenders and their good-faith attempts to honor constitutional rights.' " *Brecht v. Abrahamson*, 507 U.S. 619, 635 (1993) (quoting *Engle v. Isaac*, 456 U.S. 107, 128 (1982)). *See also Coleman v. Thompson*, 501 U.S. 722, 748 (1991); *McCleskey v. Zant*, 499 U.S. 467, 487 (1991). This Court has also often recognized the collateral, and somewhat limited, nature of federal habeas corpus review of state court convictions, referring to direct appeal in state court as "the primary avenue for review of a conviction or sentence," to which a "presumption of finality and legality attaches." *Barefoot v. Estelle*, 463 U.S. 880, 887 (1983). As such, this Court has stated that the role of federal habeas corpus proceedings is "secondary and limited," because "[f]ederal courts are not forums in which to relitigate state trials." *Id.*

With this in mind, principles of comity clearly require federal courts to defer to the determination of the state courts whether issues exist for appeal. The procedure sanctioned in *Robbins*, whereby the federal court reviews the entire state court record, in habeas corpus cases, in search of arguable issues, usurps the state court's power to enforce its criminal laws and to punish its offenders, and misconstrues the role of the federal courts in habeas corpus cases. This is particularly true in states where collateral review is available to litigate claims of ineffective assistance of counsel on appeal.[3] In

[3] *See, e.g., State v. Herrera*, 905 P.2d 1377 (Ariz. App. 1995) (allegation of ineffective assistance of appellate counsel is

those states, the performance of appointed counsel on appeal can be fully scrutinized, without the involvement of the federal courts.

D. Retroactive Application of *Robbins* Will Severely Debilitate the Federal Courts and the State Appellate Courts in Jurisdictions Where the *Anders* Procedures are Similar to California's.

Federal habeas corpus is a collateral remedy; it is not a substitute for direct review. This Court has never held that the purpose of federal habeas corpus is to address " 'a perceived need to assure that an individual accused of crime is afforded a trial free of constitutional error.' " *Teague v. Lane*, 489 U.S. 288, 308 (1989) (quoting *Kuhlmann v. Wilson*, 477 U.S. 436, 447 (1986)). Rather, the purpose of federal habeas corpus review is to provide an incentive for all trial and appellate courts to "conduct their proceedings in a manner consistent with established constitutional standards." *Id.* at 306 (citations omitted). This "deterrence function" is only served by demanding that courts adhere to the constitutional standards in place at the time of the original proceedings. *Id.* Thus, new constitutional rules of criminal procedure cannot be retroactively applied upon federal habeas corpus review unless the new rule falls within one of two very narrow exceptions.[4] *Id.* at 310.

encompassed within ARIZ. R. CRIM. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution).

[4] Specifically, a new rule should be applied retroactively on federal habeas corpus review if: (1) it places "certain kinds of

A case announces a new rule when it "breaks new ground or imposes a new obligation on the State or the Federal Government." *Id.* at 300. In other words, a case announces a new rule if the "result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Caspari v. Bohlen*, 510 U.S. 383, 390 (1994) (quoting *Teague*, 489 U.S. at 301) (emphasis in original). This principle ensures respect for the finality of state convictions and minimizes the costs to the states of having to continually relitigate convictions and sentences:

> "[S]tate courts are understandably frustrated when they faithfully apply existing constitutional law only to have a federal court discover, during a [habeas] proceeding, new constitutional commands."

Teague, 489 U.S. at 308-10 (quoting *Engle v. Issac*, 456 U.S. at 128 n.33); *see also Lockhart v. Fretwell*, 506 U.S. 364, 372-73 (1993) (*Teague* "new rule" doctrine inapplicable to decisions favoring state because states' interests in comity and finality are not diminished by applying a favorable "new rule"); *Butler v. McKellar*, 494 U.S. 407, 414 (1990) ("new rule" principle validates "reasonable, good-faith interpretations of existing precedents made by state courts even though they are shown to be contrary to later decisions").

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primary, private individual conduct beyond the power of the criminal law-making authority to proscribe." *Teague*, 489 U.S. at 307 (citation omitted); or (2) if it requires the observance of "those procedures that . . . are implicit in the concept of ordered liberty." *Id.* (citations omitted.)

Because Respondent came to the federal courts on collateral habeas review, he may not obtain federal relief "unless it can be said that a state court, at the time the conviction or sentence became final, would have acted objectively unreasonably by not extending the relief later sought in federal court." *O'Dell v. Netherland*, 521 U.S. 151, 156 (1997); *see also Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997) (the issue is whether the unlawfulness of the prisoner's conviction was apparent to "all reasonable jurists"). Habeas relief is proper only if a state court considering the prisoner's claim at the time the conviction became final would have felt *compelled* by existing precedent to conclude that the rule sought was required by the Constitution. *Gray v. Netherland*, 518 U.S. 152, 166 (1996); (quoting *Saffle v. Parks*, 494 U.S. 484, 488 (1990)).

Under this analysis, it is clear that *Robbins* announced a new rule and therefore cannot be applied retroactively. California's procedure governing no-merit briefs, which *Robbins* rejected as unconstitutional, has been in place since 1979. *See People v. Wende*, 600 P.2d 1071 (Cal. 1979). Other states have, for many years, employed procedures similar to California's without successful constitutional challenge. Like California, those states do not require counsel to state frivolous issues in order to comply with *Anders*; they allow counsel to file a brief containing only the factual and procedural background of the case. *See, e.g., State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991); *State v. Clark*, 287 Ariz. Adv. Rep. 7, 8 n. 1 (Ariz. Ct. App. Jan. 19, 1999) (attached as Appendix A). In fact, in *State v. Clark*, the Arizona Court of Appeals recently reaffirmed the constitutionality of Arizona's no-merit procedure, specifically rejecting the *Robbins* court's determination

that the procedure is constitutionally inadequate. *Clark*, 287 Ariz. Adv. Rep. at 12.

It is clear that the rule articulated in *Robbins* was not dictated by precedent existing at the time that defendant's conviction became final. Nor can it be stated that state courts considering claims that no-merit procedures, such as California's, did not comply with *Anders* would have been compelled to agree. Thus, *Robbins* announced a new rule which cannot be applied retroactively.

Moreover, retroactive application of *Robbins* will result in an avalanche of federal habeas corpus petitions filed by inmates whose appointed counsel followed state procedures existing at the time of their convictions, and therefore did not stat[illegible]rguable issues in a no-merit brief. *Robbins* will require federal courts to search state court records in each of those cases for any arguable appellate issue. This will cripple the federal courts whose jurisdictions include states following no-merit procedures similar to California's. Such review by the federal courts will undoubtedly result in a deluge of cases returning to state court for new appeals, years after convictions and first direct appeals, for the purpose of litigating frivolous, although arguable, appellate issues. In states such as Arizona, where more than 20 percent of the criminal appeals are *Anders* cases,[5] relitigation of those cases on

[5] The proportion of no-merit appeals to all criminal appeals is similarly significant in other states: Arkansas (13.33% in Ct. of App.); Florida (16.72% in 1st Dis. Ct. App., 34.19% in 5th Dis. Ct. App.); Illinois (31% in App. Dist. I); Iowa (18% in S. Ct.); Louisiana (13.4% in 3rd Cir., 25.9% in 4th Cir., 16.5% in 5th Cir.); New York (12% in App. Dis. IV); Ohio (16% in 2d Dis. Ct. App.);

appeal would cripple the state appellate court system, to the detriment of criminal defendants, indigent or not.[6]

Oregon (19% in Ct. App.); South Carolina (39% in S. Ct.); Texas (14.3% in 6th Dis. Ct. App.); Virginia (10% in Ct. App.); Washington (23.4% in App. Div. III); and Wisconsin (15.9% in Ct. App.). These figures are based on 1993-94 statistics, and were published in the following article: Martha Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 Fla. St. U. L. Rev. 625 (1996).

[6] The provisions of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) did not apply in *Robbins* because that defendant's habeas corpus petition was filed before April 1, 1996. The Ninth Circuit has recently held, however, that *Robbins* is applicable to cases subject to the AEDPA, despite the more deferential standard of review afforded state court determinations of federal law by 28 U.S.C. § 2254(d)(1). *See Delgado v. Lewis*, 168 F.3d 1148, 1154 (9th Cir. 1999); *Davis v. Kramer*, 167 F.3d 494, 498 (9th Cir. 1999), *petition for certiorari filed* Mar. 8, 1999 (67 USLW 3570). In these cases, the Ninth Circuit held that a no-merit procedure that does not require appointed counsel to raise arguable issues "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States." Thus, federal courts will also be compelled to search the record in post-AEDPA cases for arguable, although probably frivolous issues, and, if such issues are discovered, those cases will also return to state court for new appeals.

CONCLUSION

The judgment of the Ninth Circuit Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX A

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION ONE

STATE OF ARIZONA, Appellee, v. HOWARD JAMES CLARK, Appellant.	)	1 CA-CR 97-0673 DEPARTMENT E OPINION

Appeal from the Superior Court of Maricopa County
Cause No. CR 96-12400
The Honorable Alfred J. Rogers, Judge
and
The Honorable Michael A. Yarnell, Judge
AFFIRMED

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Dean W. Trebesch, Maricopa County Public Defender
by James H. Kemper, Deputy Public Defender
Attorney for Appellant — Phoenix

Howard James Clark
In Propria Persona — Florence

RYAN, Judge

¶ 1 Howard James Clark appeals from his convictions and sentences for one count of attempted first degree murder, a class two, nonrepetitive, dangerous felony, and one count of aggravated assault, a class three, nonrepetitive, dangerous felony. Counsel for Clark has filed a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967), and *State v. Leon*, 104 Ariz. 297, 451 P.2d 878 (1969), stating that he has searched the record and found no arguable question of law upon which an appeal can be based. Clark filed a supplemental brief *in propria persona* (*"pro per"*).

¶ 2 Recently, the Ninth Circuit Court of Appeals held that compliance with *Anders* requires counsel to set forth an arguable issue or issues in the brief. *Robbins v. Smith*, 152 F.3d 1062 (9th Cir. 1998), *amending* 125 F.3d 831 (9th Cir. 1997). Under *Penson v. Ohio*, 488 U.S. 75 (1988), we ordered the parties to file supplemental briefs addressing whether this court's procedure,[1] which does not require appointed counsel to allege arguable issues if counsel determines none exist, complies with *Anders* in light of the *Robbins* decision. Counsel responded and we publish this decision to guide appointed counsel in the preparation of an indigent appellant's brief after counsel has determined there are no arguable issues to the appeal.

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[1] *See State v. Scott*, 187 Ariz. 474, 478 n.4, 930 P.2d 551, 555 n.4 (App. 1996) ("When filing an *Anders* brief in Maricopa County, rather than articulate 'arguable issues,' counsel typically present a detailed statement of facts and procedure with appropriate references to the trial record. These statements serve the same purposes as identifying arguable issues by demonstrating that counsel has thoroughly reviewed the record, and by aiding this court in our own review.").

I.

¶ 3 Clark, almost sixty and legally blind, lived alone in a trailer and conducted a mechanic's business. As a result of his blindness, numerous friends stopped by from time to time to assist Clark with his daily tasks. One of these friends introduced Clark to M. L.[2] M. L. offered to stay with Clark to help him with his problems and his business. Clark accepted.

¶ 4 After M. L. had roomed with Clark for several weeks he invited a friend, E. S., to visit him. On the night of November 18, 1996, M. L., E. S., and several others had a party in Clark's trailer. Clark was visiting a friend that night and did not return home until the early morning hours of the next day.

¶ 5 That next day, two of his neighbors, Nellie Saliva and Michelle Parker, found E. S. behind the bar in Clark's trailer. Nellie and Michelle knew that Clark allowed no one behind the bar because he kept his personal things there. Suspicious, the pair followed E. S. into Clark's bedroom. There they saw that E. S. had packed several of Clark's things into her duffel bag and seemed to be preparing to leave. Michelle told Clark, who confronted E. S.

¶ 6 E. S. insisted she was not attempting to steal anything. Clark became angry and threw a tape case at her, striking her. Upset, E. S. ran from the trailer. Outside, M. L. was working on one of the vehicles that Clark had

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[2] We use initials to protect the privacy of the victims.

accepted for repair. E. S. ran past M. L., who followed her to determine what was wrong.

¶ 7 Clark then stepped out onto the porch of his trailer with a pistol. He yelled to M. L. to bring E. S. back so he could shoot her. Clark pointed the pistol in their direction. M. L. told Clark that he could not shoot because M. L. was in the way. Clark responded, "Fine, I'll shoot you." Clark fired and the bullet ricocheted off a nearby vehicle and struck M. L. in the back.

¶ 8 E. S. ran to a convenience market across from Clark's trailer and called 911. Eventually, M. L. also made it to the convenience market. The paramedics arrived and M. L. was taken to the hospital. He was treated and released the following morning.

¶ 9 In the meantime, Maricopa County deputy sheriffs had arrived and contacted Clark. Clark, now alone in his trailer, denied shooting M. L. but refused to come out and talk with police. Clark told the police that he had a flamethrower and explosives in the trailer and that he had a hostage. The deputies did not know if Clark was telling the truth, and a two-and-a-half hour stand-off ensued. Finally, Deputy David Head arrived and talked Clark into surrendering. The deputies never recovered the weapon used to shoot M. L.

¶ 10 Clark was indicted on one count of attempted first degree murder, one count of attempted second degree murder (later withdrawn), and one count of aggravated assault. At trial, M. L. and E. S. testified that Clark had pointed a pistol at them and fired, hitting M. L. Both witnesses were certain that Clark was the one that shot M. L. In addition, the State presented evidence that Clark

made phone calls from jail to ask a friend to make E. S. "disappear" before she could testify. There was also evidence that Clark offered to send M. L. to California at the time of trial to prevent him from testifying.

¶ 11 Clark defended on the basis that a "Mexican man" had actually shot M. L. Clark claimed that the man was a friend of M. L.'s who became upset when the drug deal they were transacting turned sour. Previously, on cross-examination, Clark's counsel had brought out that M. L. had seven baggies of methamphetamine when he was shot.

¶ 12 The jury convicted Clark of the two charges. The trial court sentenced Clark to concurrent, presumptive terms of 10.5 years on the attempted murder charge and 7.5 years on the aggravated assault charge. Clark appeals. We have jurisdiction under article 6, section 9 of the Arizona Constitution and Arizona Revised Statutes Annotated ("A.R.S.") sections 12-120.21, 13-4031, and 13-4033.

II.

¶ 13 We first discuss the question whether this court's procedure for dealing with *Anders* appeals is constitutional in light of the *Robbins* decision. In *Robbins*, appointed counsel, following the procedure approved by the California Supreme Court in *People v. Wende*, 600 P.2d 1071 (Cal. 1979), filed a brief in the California Court of Appeal "which briefly outlined the facts surrounding Robbins's trial and failed to present any possible grounds for appeal." 152 F.3d at 1064. Counsel also asked the court to review the record for arguable issues and promised to

remain available to address any issues found by the court. *Id.* The *Robbins* court held that this procedure failed to comply with *Anders* because counsel "completely failed to identify any grounds that arguably supported an appeal." *Id.* at 1067. It thus affirmed the federal district court's grant of habeas corpus relief. *Id.* at 1069.

¶ 14 We think our court's procedure, much like the procedure used in other jurisdictions, better appreciates appointed counsel's ethical obligations while still providing indigent appellants their constitutional rights to counsel, due process, and equal protection. We disagree with the *Robbins* decision and accordingly decline to follow it. *See State v. Vickers*, 159 Ariz. 532, 543 n.2, 768 P.2d 1177, 1188 n.2 (1989) (declining to follow a Ninth Circuit opinion holding Arizona's death penalty statute unconstitutional because that opinion rested on "grounds on which different courts may reasonably hold different views of what the Constitution requires").

A.

¶ 15 In *Anders*, the United States Supreme Court first attempted to determine the extent of appointed appellate counsel's duty to "prosecute a first appeal from a criminal conviction, after that attorney has conscientiously determined that there is no merit to the indigent's appeal." 386 U.S. at 739. There, the defendant's court-appointed lawyer, following California's established procedures, wrote a letter advising the appellate court that he had concluded his client's appeal had no merit. *Id.* Simultaneously, he advised that court that the defendant wished to file a brief on his own behalf. After reviewing

the defendant's brief and the record, the California appellate court affirmed the conviction. *Id.* Subsequently, the defendant filed a habeas corpus petition with the California Supreme Court. The California Supreme Court also affirmed defendant's conviction. *Id.* at 740-41. The United States Supreme Court reversed, holding:

> On a petition for a writ of habeas corpus some six years later [the court] found the appeal had no merit. It failed, however, to say whether it was frivolous or not, but, after consideration, simply found the petition to be "without merit." The [California] Supreme Court, in dismissing this habeas corpus application, gave no reason at all for its decision and so we do not know the basis for its action. We cannot say that there was a finding of frivolity by either of the California courts or that counsel acted in any greater capacity than merely as *amicus curiae*. . . . Hence California's procedure did not furnish petitioner with counsel acting in the role of an advocate nor did it provide that full consideration and resolution of the matter as is obtained when counsel is acting in that capacity.

Id. at 743. The Court concluded that such an approach "does not comport with fair procedure and lacks that equality that is required by the Fourteenth Amendment." *Id.* at 741.

¶ 16 The Court then reviewed the line of cases dealing with an indigent defendant's appellate rights. *See, e.g., Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (necessity of providing a transcript for indigent defendants on appeal);

Douglas v. California, 372 U.S. 353, 357-58 (1963) (appointment of counsel on appeal). Relying on the equal protection rationale of these decisions, the Court described what is required of appointed appellate counsel when counsel determines no serious basis for the indigent's appeal exists:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae*. The no-merit letter and the procedure it triggers do not reach that dignity. Counsel should, and can with honor and without conflict, be of more assistance to his client and to the court. His role as advocate requires that he support his client's appeal to the best of his ability. Of course, if counsel finds his case to be wholly frivolous, after a conscientious examination of it, he should so advise the court and request permission to withdraw. That request must, however, be accompanied by a brief referring to anything in the record that might arguably support the appeal. A copy of counsel's brief should be furnished the indigent and time allowed him to raise any points that he chooses; the court – not counsel – then proceeds, after a full examination of all the proceedings, to decide whether the case is wholly frivolous. If it so finds it may grant counsel's request to withdraw and dismiss the appeal insofar as federal requirements are concerned, or proceed to a decision on the merits, if state law so requires. On the other hand, if it finds any of the legal points arguable on their merits (and therefore not frivolous) it

> must, prior to decision, afford the indigent the assistance of counsel to argue the appeal.
>
> This requirement would not force appointed counsel to brief his case against his client but would merely afford the latter that advocacy which a non-indigent defendant is able to obtain. It would also induce the court to pursue all the more vigorously its own review because of the ready references not only to the record, but also to the legal authorities as furnished it by counsel. The no-merit letter, on the other hand, affords neither the client nor the court any aid. The former must shift entirely for himself while the court has only the cold record which it must review without the help of an advocate. Moreover, such handling would tend to protect counsel from the constantly increasing charge that he was ineffective and had not handled the case with that diligence to which an indigent defendant is entitled. This procedure will assure penniless defendants the same rights and opportunities on appeal – as nearly as is practicable – as are enjoyed by those persons who are in a similar situation but who are able to afford the retention of private counsel.

Anders, 386 U.S. at 744-45 (footnote omitted).

¶ 17 Although *Anders* implicated a defendant's rights to due process and counsel, the central principle that *Anders* sought to vindicate was equal protection. Thus, an indigent criminal defendant and a non-indigent defendant must be afforded the same basic means of presenting an appeal. Those means necessarily included an attorney to advocate on the defendant's behalf.

¶ 18 The Court reaffirmed *Anders'* equal protection rationale in *McCoy v. Wisconsin*, 486 U.S. 429 (1988). In *McCoy*, appointed counsel challenged a Wisconsin Supreme Court rule that required counsel seeking to withdraw to submit a brief to the court that included an explanation as to why issues that " 'might arguably support the appeal' " lacked merit. *Id.* at 430 (citation omitted). In deciding the issue the Court stated:

> The principle of substantial equality . . . require[s] that appointed counsel make the same diligent and thorough evaluation of the case as a retained lawyer before concluding that an appeal is frivolous. Every advocate has essentially the same professional responsibility whether he or she accepted a retainer from a paying client or an appointment from a court. The appellate lawyer must master the trial record, thoroughly research the law, and exercise judgment in identifying the arguments that may be advanced on appeal. In preparing and evaluating the case, and in advising the client as to the prospects for success, counsel must consistently serve the client's interest to the best of his or her ability. Only after such an evaluation has led counsel to the conclusion that the appeal is "wholly frivolous" is counsel justified in making a motion to withdraw.

Id. at 438-39 (footnote omitted).

¶ 19 The Court additionally noted that the "*Anders* brief is designed to assure the court that the indigent defendant's constitutional rights have not been violated." *Id.* at 442. The Court continued:

> To satisfy federal constitutional concerns, an appellate court faces two interrelated tasks as it rules on counsel's motion to withdraw. First, it must satisfy itself that the attorney has provided the client with a diligent and thorough search of the record for any arguable claim that might support the client's appeal. Second, it must determine whether counsel has correctly concluded that the appeal is frivolous.

Id. This language implicated the indigent's Sixth Amendment right to counsel. The Court sought to make certain that an indigent appellant's right to equal protection had substance; thus, it required appellate courts to use the *Anders* procedure to ensure that appointed counsel effectively performed requisite legal duties. Because the Wisconsin rule facilitated the appellate court's determination on counsel's adequacy and did not violate the defendant's constitutional rights, the Court upheld the rule.

¶ 20 The Court reiterated an indigent defendant's right to effective counsel on appeal in *Penson*, 488 U.S. at 75. In *Penson*, after the indigent petitioner and two co-defendants were found guilty of crimes in an Ohio state court, appellate counsel filed a document captioned "Certification of Meritless Appeal and Motion in the Ohio Court of Appeals." *Id.* at 77. The certificate indicated that counsel had carefully reviewed the record and found no errors requiring reversal. He also requested leave to withdraw. *Id.* at 78.

¶ 21 The Ohio appellate court granted the motion to withdraw and specified that the court would independently review the record to determine whether any reversible error existed. *Id.* After examining the record, the Ohio appellate court found that counsel's certification of meritlessness was " 'highly questionable' " and that

" 'several arguable claims' " existed. *Id.* at 79 (citations omitted). In fact, it reversed one of petitioner's convictions for plain error. However, the court concluded that petitioner suffered no prejudice as a result of counsel's performance because the court had thoroughly examined the record. The court affirmed petitioner's remaining convictions and the Ohio Supreme Court dismissed the appeal. *Id.*

¶ 22 On review, the United States Supreme Court held that the petitioner was deprived of equal protection and the right to counsel because the procedures used in Penson's case failed to comply with the constitutional requirements set forth in *Anders*. First, appointed counsel's motion did not identify anything in the record that might arguably support the appeal. *Id.* at 81. Second, the Ohio appellate court ruled on the motion to withdraw before making its own examination of the case to determine if counsel had correctly determined the appeal was frivolous. *Id.* at 82-83. These errors prevented the *Anders* brief from achieving its purpose. The Court again explained that the two functions of the *Anders* brief were to provide an appellate court with a basis for determining whether appointed counsel had performed his duty to support his client's appeal to the best of his ability, and to help the appellate court make its own determination that the appeal was indeed frivolous. *Id.* at 82.

¶ 23 The Court also stated that the Ohio court erred by failing to appoint new counsel after it had determined that several arguable claims capable of supporting the appeal existed. *Id.* at 83. Because our system of justice is premised on adversarial presentation, a defendant's right to counsel can be vindicated only by an active advocate

on his behalf. *Id.* at 84-85. The Court, therefore, concluded that an appellate court's review would not suffice to protect the indigent's constitutional rights when its review uncovered an "arguable" issue. *Id.* at 86-87.

¶ 24 Taken together, *Anders*, *McCoy*, and *Penson* set forth the constitutional minimums to ensure indigent defendants their rights to counsel, equal protection, and due process when counsel determines that no meritorious issues exist to appeal. The *Anders* line of decisions outlines a procedure that must be followed to ensure compliance with these minimum constitutional standards. Under this procedure, appointed counsel will not be permitted to withdraw unless counsel first files a brief that indicates to the appellate court that counsel has diligently attempted to find an arguable issue for the defendant. The appellate court then reviews the record to ensure counsel's diligence. If the court finds an arguable issue, it must direct counsel to assist the defendant in presenting this argument. Only if it finds no arguable issue may the court permit the indigent's appointed counsel to withdraw.

B.

¶ 25 Unfortunately, *Anders'* guarantee of equal and effective counsel has created a fundamental conflict between compliance with the Constitution's requirements and appointed counsel's ethical obligations. Simply stated, if counsel has concluded that the appeal is "wholly frivolous," counsel has also necessarily concluded that nothing in the record exists that might "arguably support" the appeal. If counsel must file a brief

after determining that the appeal has no merit, that brief may ultimately be a brief against the client.[3] By filing a "no-merit" brief, counsel is put in the uncomfortable, possibly unethical position of arguing against the client's interests.

¶ 26 The issue then becomes what exactly counsel must do to satisfy the constitutional requirements of *Anders* without running afoul of ethical obligations to the court and the defendant. Different jurisdictions have developed various approaches to resolve this problem. *See generally,* Martha C. Warner, *Anders in the Fifty States: Some Appellants' Equal Protection is More Equal Than Others'*, 23 FLA. ST. U. L. REV. 625, 669-87 (1996).

¶ 27 Several of the federal circuits require literal compliance, that is, a brief with pertinent cites to legal authority raising any "arguable" issues – notwithstanding counsel's ethical obligations. *See, e.g., Robbins*, 152 F.3d at 1067; *United States v. Pippen*, 115 F.3d 422, 426 (7th Cir. 1997) (the brief must identify, with record references and legal citations, possible grounds for error along with an argument for reversal and the reason why such an argument would be frivolous);[4] *United States v. Zuluaga*, 981 F.2d 74,

[3] This is precisely what lawyers are required to do in Wisconsin. *See McCoy*, 486 U.S. at 440-41.

[4] Significantly, the Seventh Circuit does not conduct a complete independent review of the record but confines itself to issues raised and argued in the brief. *United States v. Wagner*, 103 F.3d 551, 553 (7th Cir. 1996). In *Wagner*, Judge Posner wrote that

> [i]f in light of this scrutiny it is apparent that the lawyer's discussion of the issues that he chose to discuss is responsible and if there is nothing in the district court's decision to suggest that there are other issues the brief should have discussed, we shall have enough basis for confidence in the lawyer's competence to forgo scrutiny of the rest of the record.

Id.

75 (2d Cir. 1992) (brief must include references to the record and citations to legal authorities). Some states have adopted this logic as well and have rules explicitly detailing what is required in *Anders* briefs. *See* Warner, *supra*, at 653 nn.223 & 224; (citing ARK. R. APP. P. 4-3(j); DEL. SUP. CT. R. 26(c); IOWA R. APP. P. 104; MICH. CT. R. 7.211(c)(5); R. OKLA. CT. CRIM. APP. 3.6(B)).[5]

¶ 28 Other states do not permit appointed counsel to withdraw from representing indigents on appeal, but require counsel to brief the case on the merits. *See, e.g., State v. McKenney*, 568 P.2d 1213, 1214-15 (Idaho 1977); *Commonwealth v. Moffett*, 418 N.E.2d 585, 590-91 (Mass. 1981). However, in some of the states that do not permit counsel to withdraw, courts allow counsel to file a brief containing only the factual and procedural background of the case without raising frivolous issues. *See, e.g. Wende*, 600 P.2d at 1075; *State v. Balfour*, 814 P.2d 1069, 1079-80 (Or. 1991). Finally, a number of states have abandoned the *Anders* procedure altogether. *See* Warner, *supra*, at 651

[5] At least one commentator has noted that detailed briefing requirements frequently result in a "merits" brief being filed instead of an *Anders* brief. Filing a merits brief confines the appellate court's review to only those issues raised in the brief – in many cases reducing the appellate court's review of the record. *See* Warner, *supra*, at 653 n.223, 654 n.225; *see also Scott*, 187 Ariz. at 478, 930 P.2d at 555.

(noting that *Anders* briefs are not filed in Alaska, Hawaii, Kansas, Maryland, New Jersey, and Nebraska).

¶ 29 This variety of approaches reveals an underlying tension in the *Anders* procedure. While the Supreme Court has the authority to determine constitutional issues, it is up to the states to determine the proper ethical rules for attorneys practicing within their jurisdiction. *See, e.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773, 792 (1975) (recognizing that states have compelling interest in regulating the practice of law in their courts). Indeed, the continued survival of the various approaches suggests that the Supreme Court recognizes that there is more than one acceptable way to resolve the conflict between counsel's ethical obligations and an indigent defendant's right to effective appellate representation. Thus, as long as a jurisdiction affords indigent defendants their rights to counsel, equal protection, and due process, it may determine the proper ethical course for appointed appellate counsel who conclude that only frivolous issues exist on appeal. Within this authority, we believe this court's approach satisfactorily reconciles *Anders'* constitutional concerns with counsel's ethical obligations.

C.

¶ 30 Under our procedure, when appointed counsel determines that a defendant's case discloses no arguable issues for appeal, counsel files an *Anders* brief. The brief contains a detailed factual and procedural history of the case, with citations to the record. *See Scott,* 187 Ariz. at 478 n.4, 930 P.2d at 555 n.4. Counsel submits the brief to

the court and the defendant. The defendant is then given the opportunity to file a brief *pro per.* After receiving all briefing, the court reviews the entire record for reversible error. If any arguable issue presents itself, the court directs appointed counsel to brief the issue. Only after the court has ascertained that counsel has conscientiously performed his or her duty to review the record, and has itself reviewed the record for reversible error and found none, will the court allow counsel to withdraw. *See State v. Shattuck,* 140 Ariz. 582, 584-85, 684 P.2d 154, 156-57 (1984). We conclude that this procedure permits counsel to perform ethically, while simultaneously ensuring that an indigent defendant's constitutional rights to due process, equal protection, and effective assistance of counsel are protected.

¶ 31 We believe our procedure is appropriate for two reasons. First, the procedure does not run afoul of appointed counsel's ethical obligations. Under Arizona's ethical rules, a lawyer may not assert frivolous claims or defenses. *See* ARIZ. R. SUP. CT. 42 (professional conduct), Ethical Rule ("ER") 3.1 (meritorious claims and contentions); *see also* ER 3.3 (candor to the tribunal). Literal compliance with *Anders'* command to raise all arguable issues, notwithstanding their merit, would cause appellate counsel to violate his or her ethical obligations. *See* ER 1.16(a) ("[A] lawyer shall . . . withdraw from the representation of a client if: (1) the representation will result in violation of the Rules of Professional Conduct. . . . "). For this reason, we do not require the brief to contain non-meritorious arguments. Moreover, requiring the brief to contain non-meritorious arguments, together

with citation to legal authority indicating why such arguments are frivolous,[6] would negatively affect appointed counsel's relationship with the defendant. The client might not believe that counsel behaved as a zealous advocate on behalf of the client if counsel's brief contained reasons for the appellate court to affirm the client's conviction.[7]

¶ 32 Second, our procedure adequately protects the indigent defendant's rights to counsel, equal protection, and due process established by *Anders*, *McCoy*, and *Penson*. By requiring counsel to file an *Anders* brief setting forth a detailed factual and procedural history of the case with citations to the record, this court can satisfy itself that counsel has in fact thoroughly reviewed the record. This requirement assures that appointed counsel has diligently provided substantially equal representation to the indigent defendant. In addition, these citations to the record assist the court in determining whether counsel correctly concluded that the appeal is indeed frivolous.

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[6] Our ethical rules require an attorney to include citation to authority that proves the argument is frivolous. *See* ER 3.3(a)(3) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel . . . . ").

[7] We note that *McCoy* approved of, but did not require, this result. 486 U.S. at 443-44 (noting only that the Wisconsin procedure requiring the attorney to outline why the appeal is frivolous did no injury to *Anders'* constitutional requirements). We think the better practice is to avoid requiring appointed counsel to brief the case against his or her client.

¶ 33 Requiring a detailed history with the appropriate citations for appellate review fulfills the two functions of *Penson* (demonstrating that counsel has thoroughly reviewed the record and that the appeal is so frivolous that it may be decided without further adversarial presentation), 488 U.S. at 81-82, while avoiding the ethical dilemma of briefing the case against the defendant. *Cf. Balfour*, 814 P.2d at 1079-80 (holding that brief containing only a statement of the case, with a statement of the facts, was sufficient to protect an indigent defendant's rights to counsel and equal protection, where counsel is not permitted to withdraw). Thus, our procedure assures adequate representation, yet still provides the adversarial presentation mandated by *Penson* if an arguable issue is found by the court. *See* 488 U.S. at 84.

¶ 34 In addition, under our procedure, counsel cannot withdraw until after the court of appeals has conducted its review. *Shattuck*, 140 Ariz. at 584-85, 684 P.2d at 156-57.[8] If the court finds an arguable issue, it will order appointed counsel to brief the issue.

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[8] The decision not to allow appointed counsel to withdraw is supported by other jurisdictions and the American Bar Association Standards For Criminal Justice. *See* A.B.A. Stand. for Crim. Justice § 4-8.3 (3d ed. 1993) ("Appellate counsel should not seek to withdraw from a case solely on the basis of his or her own determination that the appeal lacks merit."). In addition, section 21-3.2(b) (2d ed. 1980 & Supp. 1986) provides as follows:

> (i) . . . Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance.

¶ 35 Moreover, if the defendant perceives that counsel has not effectively assisted in the presentation of his appeal, the defendant may petition for post-conviction relief under our rules. *See State v. Herrera*, 183 Ariz. 642, 905 P.2d 1377 (App. 1995) (holding that an allegation of ineffective assistance of appellate counsel is encompassed within Ariz. R. Crim. P. 32.1 as a claim that the conviction or sentence was in violation of the federal or state constitution). This procedure provides additional scrutiny of appointed counsel's and the court's determination that the appeal is frivolous.

¶ 36 As previously noted, the court itself reviews the record for reversible error. This review gives the indigent appellant at least one, and as many as four,[9] additional lawyers searching the record for error. We believe this extensive review assists in protecting an indigent defendant's rights to equal protection and due process.[10]

(ii) If the client chooses to proceed with an appeal against the advice of counsel, counsel should present the case, so long as such advocacy does not involve deception of the court. When counsel cannot continue without misleading the court, counsel may request permission to withdraw.

[9] Those four include the law clerk or staff attorney assigned to review the case and the three judges assigned to decide it.

[10] Some courts have recognized an anomaly created by *Anders*. The court in *Wagner* described the review process as multiple-lawyer overkill that "gives the indigent defendant more than he could expect had counsel (whether retained or appointed) decided to press the appeal." 103 F.3d at 552. *See also Wende*, 600 P.2d at 1075 ("We recognize that under this rule counsel may ultimately be able to secure a more complete review for his client when he cannot find any arguable issues

¶ 37 Finally, we note that the appellate structure we have "provides the indigent appellant with at least the same rights that an appellant with the funds to hire counsel would have, *i.e.*, an advocate on the appellant's behalf active to the permissible ethical limit." *Balfour*, 814 P.2d at 1081. Our procedure complies with *Anders'* constitutional requirements by requiring appointed counsel to perform his or her functions in a conscientious, ethical and diligent manner. Moreover, this court's review both assures counsel's compliance with these constitutional standards and provides the indigent defendant with an exhaustive search of the record for error.

¶ 38 We thus conclude that our procedure protects an indigent appellant's rights to counsel, equal protection, and due process – *Anders* requires no more. Accordingly, we decline to follow *Robbins*.

III.

¶ 39 In his *pro per* brief, Clark raises several issues on appeal. First, Clark claims that the arraignment judge told him he was guilty and that this prejudiced him. Second, Clark asserts that the victims only testified under duress from the police. Third, Clark complains that Detective Sears implied to the grand jury that Clark could actually see, that he was a "good actor." Fourth, Clark claims that the court erred by admitting only a part of his

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than when he raises specific issues, for a review of the entire record is not necessarily required in the latter situation."). Since the repeal of A.R.S. section 13-4035, which required this court to review the record for fundamental error in all criminal cases, that same anomaly exists here.

conversation with the sheriff's office dispatcher. Fifth, Clark argues that the trial court violated his speedy trial rights when it forced him to proceed with current counsel rather than allowing him to proceed with new counsel or in *pro per*. Finally, Clark complains that he has not received enough assistance from the prison to meet his special needs in preparing his appeal.

¶ 40 After reviewing the record, we find that it does not support Clark's first two arguments. First, no evidence supports that the arraignment judge told Clark he was guilty, nor that prejudice resulted from such a statement. Second, no evidence exists to show the police coerced any of the State's witnesses. Thus, neither of these arguments supplies an adequate basis for reversing the jury's verdicts.

¶ 41 Clark's third argument asserts that the grand jury would not have indicted him if Detective Sears had testified truthfully regarding Clark's inability to see. We cannot review a defendant's claim that the grand jury did not have probable cause to indict him following a finding of guilt beyond a reasonable doubt. *State v. Gonzales*, 181 Ariz. 502, 507, 892 P.2d 838, 843 (1995); *State v. Charo*, 156 Ariz. 561, 566, 754 P.2d 288, 293 (1988). In any event, Detective Sears testified to the grand jury that Clark was legally blind.

¶ 42 Clark's fourth argument, that the trial court erroneously admitted only a portion of his conversation with the sheriff's office dispatcher, similarly lacks merit. The trial court heard the entire tape during argument on Clark's motion for a new trial and did not believe the

evidence warranted a new trial. Clark's rationale for asking for the excluded portions of the tape was that it corroborated Clark's testimony that he never admitted shooting M. L. However, other witnesses at trial corroborated Clark's testimony on this point, including Sergeant Watsak, the officer talking to Clark during the stand-off. Clark was not deprived of his ability to fairly and effectively present his case by the admission of only portions of the tape.

¶ 43 Clark's fifth argument is that the trial court violated his speedy trial rights. Before trial, defense counsel and the State jointly requested a continuance to enable them to more effectively prepare their cases. The court asked Clark if he would agree to waive the requested extension of time for speedy trial purposes. Clark refused. Clark demanded an immediate trial and offered to handle the case *pro per*, or alternatively, wanted different counsel appointed so he could have an immediate trial.

¶ 44 We review a trial court's decision granting a continuance to allow counsel adequate time to prepare a case for an abuse of discretion. *State v. McWilliams*, 103 Ariz. 500, 501-02, 446 P.2d 229, 230-31 (1968); *State v. LeVar*, 98 Ariz. 217, 220-21, 403 P.2d 532, 535 (1965). "When defense counsel states that he is not adequately or fully prepared on the eve of trial, where the lack of preparation is not due to an absence of diligence on his part, a trial judge does not err in continuing the matter." *State v. Smith*, 146 Ariz. 325, 326-27, 705 P.2d 1376, 1377-78 (App. 1985). This result does not change even if the defendant insists on an immediate trial. *Id.* at 327, 705 P.2d at 1378. Thus, we will affirm a trial court's decision granting a continuance,

despite a defendant's insistence on an immediate trial, when the facts indicate that defense counsel needs more time to prepare and no evidence exists of a lack of diligence by counsel.

¶ 45 The trial court granted the joint motion for a continuance and denied Clark's motion to proceed *pro per* or to retain new counsel. The court stated that defense counsel was "an experienced and very competent attorney in these matters," and found that the continuance was justified by "extraordinary circumstances and in the interest of justice." It further stated:

> I have carefully weighed the issue of the defendant's desire to go to trial immediately – though his desire to go to trial immediately or represent himself or have counsel is all inconsistent with an immediate trial – and the defendant's constitutional right to at least adequate representation by counsel. I find specifically representation by counsel is more important in this case than trying the case precipitously, either with or without counsel.

Thus, the trial court determined that defense counsel had adequately represented the defendant but that he needed more time to effectively prepare his case. Accordingly, it did not abuse its discretion by granting the joint motion for a continuance or denying Clark's motion for new counsel.[11]

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[11] We note that the prosecutor joined in the motion to continue due to a scheduling conflict. A trial court may find that a prosecutor's scheduling conflict constitutes extraordinary circumstances justifying the continuance of a defendant's trial. *See State v. Mendoza*, 170 Ariz. 184, 194, 823 P.2d 51, 61 (1992).

¶ 46 Finally, Clark claims that the prison denied him the assistance he needed to adequately prepare his supplemental brief. Specifically, Clark complains that due to his blindness he is entitled to have recordings of the entire trial or have someone read the transcripts to him; additionally, he requests that he be allowed to communicate with the court via tape recorded statements.

¶ 47 The Constitution requires that a prisoner be provided meaningful access to the courts. *Lewis v. Casey*, 518 U.S. 343, 350 (1996); *Bounds v. Smith*, 430 U.S. 817, 821, 828 (1977). A prisoner's right of access includes a right to have the transcripts of his trial made available to him. *Griffin*, 351 U.S. at 19. It also includes the right to access a law library or have legal assistance provided, but only as a means for ensuring " 'a reasonably adequate opportunity to present claimed violations of fundamental constitutional rights to the courts.' " *Lewis*, 518 U.S. at 351 (quoting *Bounds*, 430 U.S. at 825). In other words, a prisoner must demonstrate not only a denial of meaningful access but also that the denial has actually injured his ability to present a meritorious argument to the court. *Id.*

¶ 48 The record does not support Clark's contention that he has been denied meaningful access to the court. First, Clark received copies of the transcripts of his trial. Second, since his counsel's *Anders* brief was filed on February 17, 1998, Clark has filed four documents, including one in which he asked to have considered as his supplemental brief, with this court. These documents reference legal authority and indicate his familiarity with the record. Far from indicating a denial of meaningful access, these pleadings reveal that the prison is providing Clark ample opportunity and assistance to pursue his

appeal. Finally, in recognition of Clark's blindness, we granted Clark two extensions of time to file his brief. Thus, from this record, Clark has been given meaningful access to the court.

¶ 49 In addition, Clark has not indicated an actual injury resulting from his alleged denial of access to the court. To show actual injury, Clark must demonstrate that the denial prevented him from asserting some legitimately appealable issue. *Id.* He cannot do so. Appointed counsel filed an *Anders* appeal on his behalf. Clark himself filed a supplemental brief. We have considered and addressed his arguments. Also, we have reviewed the record for reversible error and have found none. Clark cannot show any injury from his alleged denial of access to the court.

IV.

¶ 50 In summary, we conclude that our procedure for deciding non-meritorious appeals fully complies with the requirements of *Anders*. Thus we decline to follow the Ninth Circuit's decision in *Robbins*. We have also thoroughly reviewed the record and find no reversible error. The record shows that Clark was represented by counsel at all stages of the proceedings and on appeal, and that the trial court afforded Clark all of his rights under the constitution, our statutes, and the Arizona Rules of Criminal Procedure. The evidence supports the jury's verdict, and the sentence imposed falls within the range prescribed by law.

¶ 51 Upon the filing of this decision, counsel's obligations pertaining to the representation of Clark in this

appeal have come to an end. Counsel need do no more than inform Clark of the status of his appeal and of his future options, unless counsel's review reveals an issue appropriate for submission to the Arizona Supreme Court by petition for review. *See Shattuck*, 140 Ariz. at 584-85, 684 P.2d at 156-57. Clark shall have thirty days from the date of this decision in which to proceed, if he desires, with a *pro per* motion for reconsideration or petition for review.

¶ 52 We affirm Clark's convictions and sentences.

MICHAEL D. RYAN, Presiding Judge

CONCURRING:

CECIL B. PATTERSON, JR., Judge

JEFFERSON L. LANKFORD, Judge

(19498)